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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re D.W., a Person Coming Under the
Juvenile Court Law.

SAN BERNARDINO COUNTY
CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

K.W.,

Defendant and Appellant.

E058623

(Super.Ct.No. J231948)

OPINION

APPEAL from the Superior Court of San Bernardino County. Cheryl C. Kersey,
Judge. Affirmed.

Joseph T. Tavano, under appointment by the Court of Appeal, for Defendant and
Appellant.

Jean-Rene Basle, County Counsel, and Regina A. Coleman, Principal Assistant
County Counsel, for Plaintiff and Respondent.

I. INTRODUCTION

K.W. (mother) appeals from the termination of her parental rights as to D.W., born in August 2009, under Welfare and Institutions Code¹ section 366.26. Mother contends the trial court erred in failing to apply the beneficial parental relationship exception to adoption. We find no error, and we affirm.

II. FACTS AND PROCEDURAL BACKGROUND

In March 2010, San Bernardino County Children and Family Services filed a petition as to D.W.² under section 300, subdivisions (a) (serious physical harm), (b) (failure to protect), (c) (serious emotional damage), (e) (severe physical abuse), (g) (no provision for support), and (i) (cruelty).³ The detention report stated that paramedics were summoned to the home of D.W.'s father⁴ because D.W., then seven months old, was not breathing. D.W. was transported to the hospital in full cardiac arrest. She had old and new bruising on her forehead, temple, mouth, cheek, and leg, and she had a human bite mark on her calf. Her airway was swollen, possibly from being choked. She had a skull fracture, and a CT scan revealed bleeding in her brain. Father reported

¹ All further statutory references are to the Welfare and Institutions Code.

² Petitions were also filed as to D.W.'s half siblings, H.L. (born in 2008) and P.L. (born in 2006). H.L. and P.L. are not involved in this appeal, and we address their circumstances only as relevant to the issue mother raises herein.

³ Mother filed a notice of intent to file writ petition in December 2012 in case No. E057677. The petition was dismissed in January 2013. We have incorporated the record in case No. E057677 in the record in the instant case.

⁴ D.W.'s father is not a party to this appeal.

that D.W. had injured herself by hitting herself with a hairbrush; however, the examining physician opined that was not possible and that the injuries resulted from child abuse.

Mother reported she and father had separated about a month earlier, and father had been caring for D.W. when the injuries were inflicted. Father had hit and kicked mother during their relationship. Mother let father take D.W. because mother did not believe he would hurt her in any way, even though father had a history of “flicking” D.W.’s hand to make her cry so she would cry herself to sleep. Father was arrested for attempted murder.

At the detention hearing, the juvenile court found a prima facie case had been established and detained D.W.

CFS filed a jurisdictional/dispositional report in April 2010. Tests were being conducted to determine the extent of D.W.’s injuries. In addition to the injuries listed in the detention report, she had a fracture on the head, hemorrhaging in one eye, a collapsed left lung, and fluid in a lobe of the right lung that had led to pneumonia.

Mother told the social worker she and father used marijuana for medical purposes. Mother had started parenting classes. Father had charges pending against him for domestic violence and carrying a concealed weapon. He admitted kicking K.W. once in 2009 but denied any other domestic violence. He admitted he had flicked D.W. on the hand to put her to sleep. He and K.W. had separated in February, and D.W.’s paternal grandmother had taken care of D.W. while he was in jail for 20 days for the concealed firearm charge. Mother had D.W. for about a week before the current incident, and when father got D.W. back, she had a bite mark. A few days later, he put D.W. in the crib

while he took a shower, and she hit herself in the head with a hairbrush and gave herself a black eye. D.W. started getting sick and had a fever, and he put her on the bed to sleep. The paternal grandmother told him she fell off the bed, and father saw a knot on the back of her head. The paternal grandmother took D.W. to her home to spend the night, and when father picked D.W. up the next morning, she threw up milk and blood and she stopped breathing.

CFS filed an addendum report in May 2010. Additional medical evaluation had revealed that D.W. was blind, but her hearing had improved.

At the jurisdictional/dispositional hearing, mother's counsel stated that mother had indicated she did not understand the proceedings and could not assist counsel in representing her. Counsel requested the appointment of a guardian ad litem for mother. The juvenile court granted the request and continued the matter for the appointment of a guardian ad litem. At the continued jurisdictional/dispositional hearing, the juvenile court found the allegations of the petition true and removed D.W.'s custody from parents. The court ordered reunification services for K.W., including a substance abuse program, individual counseling, and parenting education.

CFS filed a six-month status review report in December 2010. D.W. had been placed in a foster home trained for children with special healthcare needs. Mother was living in a two-bedroom apartment with her two adult brothers and J.L., the father of H.L. and P.L. K.W. was the primary caregiver for one of her brothers who was developmentally delayed, and for her grandmother. Mother had consistently cooperated with CFS and actively participated in her case plan. She had participated in individual

counseling, participated in dependency drug court, and had completed a substance abuse outpatient program and nine weeks of parenting education. She also completed an additional 10-week parenting course, a nine-week domestic violence course, and a 14-week jobs/career course. Mother had visited D.W. once weekly for two hours, although she occasionally missed visits or was late for visits.

D.W. suffered from seizures, and the physical abuse had caused developmental delays, blindness, and partial deafness. However, she had recently started focusing on people's faces and reaching for items, and she responded to noises and voices. She had adjusted well to her foster placement and sought comfort from the foster mother.

At the six-month review hearing, the juvenile court found mother had made substantial progress toward mitigating the causes for the dependency and ordered continuation of reunification services for mother.

CFS filed a 12-month status review report in June 2011. Mother had moved into a five-bedroom home, and the social worker found it to be clean and intact. Mother had custody of her two younger sisters and cared for them while the maternal grandmother was incarcerated. Mother's grandmother, aunt, and three adult brothers also lived in the home, and mother continued as the primary caregiver for her brother and grandmother.

D.W. continued to suffer from seizures and visual impairment, and she also had cerebral palsy and eczema. She was nonetheless a happy, friendly baby who was attached to her foster mother. The foster family was willing to adopt her.

Mother continued to comply with reunification services, had developed a domestic violence prevention program for herself, and completed a domestic violence class. She graduated from dependency drug court in May 2011. She completed a parenting class for medically fragile children and attended doctor's appointments with the foster mother. Mother visited D.W. twice a week for two hours and the visits had gone well. She had attended most of the scheduled visits.

At the hearing on June 21, 2011, mother's counsel stated she did not believe mother required a guardian ad litem any longer. Counsel no longer had difficulty communicating with mother and understanding her. The court relieved the guardian ad litem on August 24, 2011. At the 12-month review hearing, the juvenile court again continued reunification services for mother.

CFS filed an 18-month status review report in September 2011. The social worker requested that all the adults in mother's home be live scanned. D.W. was developmentally delayed, and had "mild, spastic, quadriplegic cerebral palsy" and "mild nearsightedness." She was adjusting well to her foster home, and the home met her medical needs. Mother had completed a CPR class. She needed additional training so she could learn how to recognize when D.W. had seizures and how to administer her medication. The foster mother provided training during visits. Mother had been attending medical appointments with the foster mother and had attended D.W.'s Inland Regional Center assessment. Mother continued to have supervised visits with D.W. for two hours twice a week.

The social worker opined that it was in D.W.'s best interest to be returned to mother. Mother had a great desire to be reunified with D.W. and had complied with her case plan. The social worker was concerned about the demands on mother as the caregiver to so many others, and also believed mother needed to become more actively involved in monitoring D.W.'s medical care.

The foster mother reported on mother's visits with D.W. On May 11, 2011, D.W. played well with mother. Mother brought food and did well trying to feed D.W., despite her problems with eating. Mother asked questions and communicated her concerns well. At a June 3 visit, mother again did well with D.W., even though D.W. was not in a good mood. On June 5, the foster mother took D.W. to mother's home and saw the room mother had prepared for D.W. Mother's brother and his girlfriend came home, and they appeared to be under the influence. It appeared they and other relatives were living in the garage, and the foster mother believed unreported persons were living in the home.

At the 18-month review hearing, the juvenile court found that mother had made substantial progress toward reunification and that adoption was not in D.W.'s best interest, and there was no adult available to become her legal guardian. The court terminated reunification services but ordered services to be provided to mother under D.W.'s permanent plan. Mother agreed that all members of her household would complete fingerprinting, and CFS agreed to begin unsupervised visits when appropriate.

CFS filed a status review report in April 2012. Mother still had six other people (her three adult brothers, her grandmother, and her two minor sisters) in her household, and all the adults had been cleared. The foster mother reported that mother missed

D.W.'s doctor appointments and had not adequately prepared herself to care for D.W.'s medical needs. Since reunification services were terminated in September 2011, mother's interaction with D.W. had been minimal—she had visited D.W. eight times in the last reporting period. H.L. and P.L. were soon going to be returned to mother under a family maintenance plan, and the social worker stated that if that plan was successful, she would also recommend a family maintenance plan for D.W. A report from Walden Family Services was attached to the status review report. The social worker stated that the foster mother had reported that D.W. did well with mother when mother visited frequently, but when mother missed visits, D.W. did not interact well with mother and avoided her.

At the review hearing, the juvenile court ordered the permanent plan of placement with the foster parents with the goal of return to mother when appropriate.

CFS filed a review report in October 2012. Mother had reunified with H.L. and P.L., and she moved to a two-bedroom apartment with H.L., P.L., two of mother's adult brothers, her grandmother, and an adult nephew. She continued to care for her disabled grandmother and brother. Mother had been told to rearrange her home so that adults and children did not sleep in the same space, and mother did so. Mother continued to miss doctor appointments with D.W. and had not consistently visited her. Between April 2012 and September 2012, she visited D.W. 16 times; eight of those visits were in August and September. The social worker stated that because mother had missed so many visits, she and D.W. were not bonded. The foster mother reported that mother was unable to control D.W.'s tantrums. She also reported seeing multiple unknown people living in mother's

home, and the foster mother believed they were under the influence of drugs or alcohol. The foster mother did not believe mother and D.W. were bonded to one another and did not believe mother could safely and adequately care for D.W.'s special needs.

On October 22, 2012, mother filed a petition under section 388, stating that H.L. and P.L. had been returned to her under a family maintenance plan and the juvenile court had dismissed their case in August 2012 with an order granting her sole legal and physical custody. She stated that the change would be in D.W.'s interest because "Mother has the other two siblings in her care and has maintained consistent visitations with [D.W.]. Further, Mother has attended [D.W.'s] medical appointments and has learned to care and can meet [D.W.'s] medical needs."

CFS filed a response to mother's petition. The social worker recommended that the court sustain the petition and grant more reunification services for mother. The social worker had observed mother and D.W. interacting with one another. All the adults living in mother's apartment had been cleared. The children shared one of the bedrooms and had their own beds, and the apartment was suitable for habitation. Mother explained she had missed D.W.'s medical appointments because of transportation problems, but those problems had been resolved. She reported she was bonded with D.W. and loved her, but D.W. was more bonded to the foster mother who spent more time with her. The social worker was concerned that mother cared for so many people, and mother said she had the help of another brother and two aunts who lived nearby.

The juvenile court held a hearing on the petition in December 2012. The social worker testified she was recommending continuing services to mother. Mother had

complied with the social worker's requests that she and the other adults in her home complete first aid and CPR training and that sleeping arrangements in the home be rearranged. Mother was still caring for her severely disabled brother and her grandmother who had Alzheimer's. The social worker recommended parent-child interaction training and medical training for mother. The social worker testified that mother explained she had missed visits because of transportation problems, but the problems had been eliminated and mother had been consistent with her visits since August. Mother had not visited D.W. during "a span of a few months that was documented by the foster parent." Based on the social worker's observation, D.W. was more bonded to her foster parents than to mother and the half siblings, and she recognized the foster parents as her parents.

The foster mother testified that D.W. had lived with her continuously since April 2010. D.W. was legally blind but she would not wear glasses because she could not tolerate anything touching her head. Her peripheral vision limitation was a result of the brain injury and could not be corrected with glasses. The brain injury had caused her to have three strokes while she was in the hospital and also caused her seizures. The medication she required for her seizures caused behavioral problems, and she also had impulse control problems. She received speech therapy, occupational therapy, and physical therapy at school. She was seeing six specialists, and she had medical appointments between one and six times per month. After the April court date, there had been a 59-day period during which mother did not visit D.W.

The juvenile court denied the petition, finding that mother had not shown a sufficient change of circumstances, and returning D.W. to mother was not in the child's best interest. The court set the matter for a hearing under section 366.26.

CFS filed a section 366.26 report in April 2013. The social worker reported mother had visited D.W. six times between December 2012 and February 2013, and she had attended three of five medical appointments for D.W. The foster parents who had raised D.W. since her release from the hospital at eight months of age wished to adopt her and were committed to her long-term care. D.W. was attached to them and called them "Mama" and "Dada." D.W. was having daily temper tantrums that consisted of "loud uncontrollable screaming, crying and acting out." The foster parents were open to continued contact between D.W., mother, and the half siblings so long as the contact did not appear to be detrimental to D.W.'s well-being.

At the section 366.26 hearing, mother testified she had visited D.W. two hours weekly during the last six months. During the visits, they played, and D.W. called her "Mom," recognized her as her mother, and displayed affection by following her when mother walked into the room. When mother went to the restroom, D.W. would knock on the door and call, "Mom. Mom." Mother testified she had been to "a few" of D.W.'s medical appointments and had "only missed about three." She testified she asked questions during the appointments, but they had trained her how to care for D.W.'s medical needs "[v]ery little." She believed she and D.W. had a bond.

The juvenile court found it was likely D.W. would be adopted and terminated mother's parental rights.

III. DISCUSSION

A. Standard of Review

We review the juvenile court's finding as to the existence of a beneficial relationship under the substantial evidence standard. (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314.) When the party with the burden of proof appeals, contending the trier of fact erred in concluding that party failed to meet his or her burden, the question on appeal "becomes whether the evidence compels a finding in favor of the appellant as a matter of law." (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1528.) Accordingly, "a challenge to a juvenile court's finding that there is no beneficial relationship amounts to a contention that the 'undisputed facts lead to only one conclusion.'" (*In re Bailey J., supra*, at p. 1314.)

The determination whether a compelling reason exists for determining that termination of parental rights would be detrimental to the child is a "quintessentially" discretionary decision, which calls for the juvenile court to determine the *importance* of the relationship in terms of the detrimental impact that its severance can be expected to have on the child and to weigh that against the benefit to the child of adoption. (*In re Bailey J., supra*, 189 Cal.App.4th at p. 1315.)

B. Beneficial Relationship

To establish the beneficial-relationship exception to termination of parental rights, a parent has the burden of showing "both regular visitation and contact [with the child] and benefit to the child in maintaining the parent-child relationship." (*In re Helen W.* (2007) 150 Cal.App.4th 71, 80-81.)

With respect to visitation, mother visited D.W. once a week for two hours with supervision during the first six months of the dependency, and she missed few visits. During the next 12 months, mother visited D.W. twice a week for two hours, again with supervision, and her visitation continued to be generally consistent. However, after the 18-month review hearing, mother's visits became more irregular. We will nonetheless assume for purposes of argument that mother has established the regular visitation prong of the beneficial relationship exception.

With respect to the "benefit to the child" prong of the exception, a beneficial relationship is one that "promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents.'" (*In re Brandon C.* (1999) 71 Cal.App.4th 1530, 1534.) The parent has the burden of demonstrating that "severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed" (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) The court in *In re Autumn H.* described parent-child relationships that can prevent termination of parental rights as relationships that "promote[] the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural

parent's rights are not terminated. [¶] Interaction between natural parent and child will always confer some incidental benefit to the child. The significant attachment from child to parent results from the adult's attention to the child's needs for physical care, nourishment, comfort, affection and stimulation. [Citation.] The relationship arises from day-to-day interaction, companionship and shared experiences. [Citation.] The exception applies only where the court finds regular visits and contact have continued or developed a significant, positive, emotional attachment from child to parent." (*Id.* at pp. 575-576.) Courts decide the application of this exception on case-by-case basis, taking into account such factors as the minor's age, the portion of the minor's life spent in the parent's custody, whether interaction between parent and child is positive or negative, and the child's particular needs. (*Ibid.*)

Applying the *In re Autumn H.* factors to the circumstances in this case, we first note that D.W. was only seven months old when the dependency petition was filed, and she had been living with father out of mother's care for about a month before she was removed. She is now four years old and has thus lived the great majority of her life away from mother.

In over three years of the dependency, D.W. never had unsupervised or overnight visits with mother. During their visits, mother talked to D.W. and played with her. However, both the social worker and the foster mother believed mother was not bonded to D.W., although mother believed they had a bond. It was undisputed that D.W. was bonded to her foster parents.

As a result of her abuse, D.W. has special medical and emotional needs. She is on medication to prevent seizures; she had posttraumatic stress disorder; she has no peripheral vision; she is not verbal; she cannot tolerate anything, including glasses, touching her head; she suffered three strokes while in the hospital; she suffers from mild, spastic quadriplegic cerebral palsy; she has developmental delays and behavioral issues (severe tantrums). She requires constant supervision, is easily agitated, does not sleep through the night, and is not toilet trained. She sees six specialists.

Mother cares not only for her two other young children, but also for a severely disabled adult brother and grandmother. Although it was undisputed that mother diligently complied with her reunification plan, the social worker believed mother was not yet prepared to monitor all of D.W.'s medical needs.

Based on all the circumstances, we cannot say the juvenile court abused its discretion in determining that the benefit to D.W. from the security and permanency of an adoptive family who had cared for her most of her life and who were bonded to her and loved her outweighed the benefit of continuing a relationship with mother.

IV. DISPOSITION

The order appealed from is affirmed.

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HOLLENHORST

J.

We concur:

RAMIREZ

P.J.

KING

J.